

## TOBACCO LAW ENFORCEMENT

### Iowa Code Chapter 453A

#### Definitions:

**Alternative nicotine product** - a product, not consisting of or containing tobacco, that provides for the ingestion into the body of nicotine, whether by chewing, absorbing, dissolving, inhaling, snorting, or sniffing, or by any other means. . . [it] does not include cigarettes, tobacco products, or vapor products, or a product that is regulated as a drug or device by the United States food and drug administration under chapter V of the federal Food, Drug, and Cosmetic Act.

**Cigarette** - any roll for smoking made wholly or in part of tobacco, or any substitute for tobacco, regardless of size, shape, flavor, adulterated or mixed with any other ingredient, where the roll has a wrapper or cover made of any material. Cigars are excluded. 453A.1(3).

**Cigarette Vending Machine** - any self-service device for public use that takes money and dispenses cigarettes or tobacco products. 453A.1(4).

**Person** - every individual, firm, association, joint stock company, syndicate, partnership, corporation, trustee, agency or receiver, or respective legal representative. 453A.1(18).

**Retail Permit** - permit issued to retailer by its local licensing authority. 453A.1(22). (retail permit includes those issued to retailers pursuant to Division II of 453A (tobacco products). Iowa Code section 453A.22(8)).

**Retailer** - every person in this state who sells, distributes, or offers for sale, for consumption or possesses for the purpose of sale for consumption, cigarettes, alternative nicotine products, or vapor products regardless of quantity or amount or the number of sales. 453A.1(21). Pursuant to Iowa Code section 453A.22(8), retailer includes those in the business of selling tobacco products to consumers pursuant to Division II of 453A (tobacco products). Iowa Code section 453A.42(10).

**Tobacco Products** - cigars, little cigars, cheroots, stogies, periques, granulated, plug, cut, crimp cut, ready rubbed, and other smokeless tobacco, snuff, snuff flower, cavendish, plug and twist tobacco, fine cut and other chewing tobaccos, shorts, or refuse scraps, clippings, cuttings and sweepings of tobacco, and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking. Cigarettes are excluded from this definition. 453A.1(26).

**Vapor Product** - any noncombustible product, which may or may not contain nicotine, that employs a heating element, power source, electronic circuit, or other electronic, chemical, or mechanical means, regardless of shape or size, that can be used to produce vapor from a solution or other substance. . . includes an electronic cigarette, electronic cigar, electronic cigarillo,

electronic pipe, or similar product or device. . . [it] does not include a product regulated as a drug or device by the United States food and drug administration under chapter V of the federal Food, Drug, and Cosmetic Act.

## **CIVIL PROSECUTION OF CIGARETTE/TOBACCO PERMIT HOLDERS**

**If a Retailer** or its **employee** has committed any of the following violations:

- \* sells, gives or otherwise supplies any tobacco, tobacco products, alternative nicotine products, vapor products, or cigarettes to a person under the age of 18 (453A.2(1))
- \* Any sales of tobacco, tobacco products, alternative nicotine products, vapor products or cigarettes through a vending machine located in a place where a person under the age of 18 is present or permitted to enter at any time (453A.36(6))

**Then the following penalties shall be assessed:**

- \* 1<sup>st</sup> violation - \$300.00. Failure to pay this civil penalty shall result in an automatic 14 day suspension of the retail permit. (453A.22(2)(a)).
- \* 2<sup>nd</sup> violation (within 2 years) - \$1500.00 **or** a 30 day suspension of the retail permit. Retailer may voice a preference in penalty. (453A.22(2)(b))
- \* 3<sup>rd</sup> violation (within 3 years) - \$1500.00 **and** a 30 day suspension of the retail permit. (453A.22(2)(c)).
- \* 4<sup>th</sup> violation (within 3 years) - \$1500.00 **and** a 60 day suspension of the retail permit. (453A.22(2)(d)).
- \* 5<sup>th</sup> violation (within 4 years) - the retail permit **shall** be revoked. (453A.22(2)(e)).

## **PROCEDURE**

### **City/County enforcement:**

City and County Attorneys should be aware of tobacco compliance checks in their jurisdiction. Law enforcement agencies who conduct compliance checks must notify the City Clerk or County Auditor of any noncompliant locations within 72 hours of issuing a citation. (28E Agreement for Tobacco Enforcement 5.1.2). You may want to ask your City Clerk or County Auditor to forward you all the criminal citations involving Iowa Code sections 453A.2(1) or 453A.36(6) that fall within the jurisdiction of the City/County. The Alcoholic Beverages Division (ABD), forwards violations to the Attorney General's Office.

The City/County has the first opportunity to pursue administrative action against a permit holder. 453A.2(6). If the City/County chooses to pursue this matter, it must, within 60 days of

the adjudication of the underlying criminal violation, assess a penalty either by settlement or hearing. After 60 days, jurisdiction for the civil penalty transfers to the ABD. The State may grant a waiver of the 60 day deadline upon request. The permit holder is entitled to constitutional procedural due process rights which are notice and an opportunity to be heard. *Randall's International Inc. v. Iowa Beer & Liquor Control Dept.*, 429 N.W.2d 163 (Iowa 1988).

You may attempt to resolve these matters prior to or after bringing an administrative action. The penalties are mandatory and there is no authority to suspend or modify the fines or suspensions specifically outlined in the Iowa Code. For resolution purposes, begin by sending a Notice of Hearing by certified mail to the cigarette permit holder. The Notice should be sent to the permit holder at the business location and to the address of the legal owner as found on the permit application. Send the same information to the City/County. (Sample Notices of Hearing are attached.)

Include with your Notice of Hearing to the permit holder the Hearing Complaint, and copies of the cigarette/tobacco/vapor products permit application, the cigarette/tobacco/vapor products permit, the criminal citation and the disposition of the criminal action. Enclose an Acknowledgment and Settlement Agreement setting out the resolution available for the violation. (Sample Acknowledgment and Settlement Agreements are attached.) As stated previously, the penalties are mandatory and there is no authority to suspend or modify the statutory fines or suspensions. If the permit holder chooses to voluntarily forfeit the permit in lieu of the statutory penalties, the forfeiture must be for no less than one year. Any signed Agreement must be accompanied by a check in the appropriate amount and forwarded to the City/County. (Samples Hearing Complaints are attached.)

After the City/County receives the Settlement Agreement it must issue an Order acknowledging same. If a suspension is involved, the suspension dates must be included in the Order. (Sample Orders Accepting the Agreement are attached.)

If you do not reach resolution, file the Hearing Complaint with the City/County and schedule a hearing. To prove a violation of 453A.2(1), there must be substantial evidence that: 1) a sale of tobacco or vapor products was made to a minor **and** 2) the sale was made by the permit holder or an employee of the permit holder. Exhibits will include certified copies of the cigarette/tobacco /vapor products permit, the criminal citation and the criminal disposition. If the violation is for a second or subsequent violation, a certified copy of the Order or Settlement Agreement pertaining to the first and/or subsequent violation from the issuing authority must be included in the evidence presented to prove a previous violation.

If the City/County finds a violation of Iowa Code 453A, the City/County must issue an order and forward same to the prosecuting entity and the permit holder. (Sample Orders Assessing Penalties are attached.) If the offense is a first violation, the \$300.00 penalty must be paid or there is an automatic suspension of the permit for 14 days. This is an additional penalty for not paying the assessed fine, not an alternative to the \$300.00 penalty. Any civil penalties

assessed and collected by the City/County shall be retained by that city/county. 453A.2(5).

An appeal of this order must be made by a Writ of Certiorari to the District Court. I.R.Civ.P. 1.1401 et seq. *Meyer v. Jones II*, 696 N.W.2d 611 (Iowa 2005).

#### **State enforcement:**

If the City/County does not assess a penalty within 60 days of adjudication of the criminal citation or declines to prosecute the civil offense, the matter **shall** be transferred to the ABD. Iowa Code section 453A.2(6)(2011). Civil penalties assessed and collected by ABD are placed in a fund used to develop and administer the tobacco compliance employee training program. 453A.2(7).

#### **Affirmative Defense:**

Retailers may assert an affirmative defense of training as a bar to prosecution of the civil sanction for selling to a minor if the **employee** who sold the tobacco, tobacco products, alternative nicotine products, vapor products, or cigarettes has a valid certificate of completion of the tobacco compliance employee training program conducted by ABD. Only completion of the ABD program may be used for this affirmative defense. The retailer may assert this defense **only**: once in four years for a violation of 453A.2 that occurs at the same place of business. (453A.22(3)).

#### **Resource personnel:**

ABD is responsible for developing a tobacco compliance employee training program. (453A.5). The training is online. Questions about this program may be directed to Shannon Pogones at 515-281-3426 or [Pogones@IowaABD.com](mailto:Pogones@IowaABD.com)

Questions about whether there has been any violation of 453A in a particular jurisdiction may be directed to Connie Larson at 515-281-5846 or [Connie.Larson@iowa.gov](mailto:Connie.Larson@iowa.gov).

### **MISCELLANEOUS TOBACCO ENFORCEMENT**

#### **Criminal:**

A person, other than a retailer, who sells, gives, or otherwise supplies any tobacco, tobacco products, alternative nicotine products, vapor products or cigarettes to any individual under the age of 18, is guilty of a simple misdemeanor. 453A.3(1)(a). The penalties include fines of \$65.00 to \$625.00 and/or up to thirty (30) days in jail. Any person under eighteen years of age convicted pursuant to this section may be required to pay a fine of up to \$100.00 or perform community service. 903.1(3).

An employee of a retailer who sells, gives, or otherwise supplies tobacco, tobacco products, alternative nicotine products, vapor products or cigarettes to a person under eighteen years of age, is guilty of a simple misdemeanor. 453A.3(1)(b). See 805.8C(3)(b): 1<sup>st</sup> offense \$100.00, 2<sup>nd</sup> offense 250.00, 3<sup>rd</sup> or subsequent offense \$500.00.

### **Identification:**

If a permit holder has a reasonable belief based on factual evidence that a driver's license or non operator's identification card offered by a person attempting to purchase tobacco, tobacco products, alternative nicotine products, vapor products, or cigarettes or tobacco products is altered or falsified or belongs to another person, the permit holder or employee may retain the license or card. The permit holder must give the person a receipt for the card with the date and hour of seizure noted. Within 24 hours of seizure, the card must be given to the appropriate law enforcement agency of the jurisdiction and the permit holder must file a written report of the circumstances why the card was retained. 453A.4.

### **Minors:**

A person under eighteen shall not smoke, use, possess, purchase, or attempt to purchase any tobacco, tobacco products, alternative nicotine products, vapor products, or cigarettes. 453A.2(2). Civil penalty: 1<sup>st</sup> offense \$50.00, 2<sup>nd</sup> offense \$100.00, 3<sup>rd</sup> and subsequent offense \$250.00. 805.8C(3)(c). (No criminal penalty surcharge or court costs).

A person under eighteen who alters or displays or has in their possession a fictitious or fraudulently altered driver's license or a non-operator's id card, and who uses this license or card to smoke, use, possess, purchase, or attempt to purchase any tobacco, tobacco products, alternative nicotine products, vapor products, or cigarettes, commits a simple misdemeanor. 321.216C. This is punishable by a fine of \$200.00. 805.8A(4)(j).

### **No violation of 453A.2:**

An individual under eighteen who possesses tobacco, tobacco products, alternative nicotine products, vapor products, or cigarettes as part of that individual's employment with a person who holds a valid cigarette/tobacco permit or who lawfully offers for sale or sells cigarettes or tobacco products does not commit a violation as long as he/she does not sell to a minor. 453A.2(3).

An individual under eighteen does not commit a violation of this section if he/she is participating in a compliance check of tobacco, tobacco products, alternative nicotine products, vapor products, or cigarettes laws if the compliance effort is conducted:

- \* by or under the supervision of law enforcement officers; or

- \* with the advance knowledge of law enforcement officers and reasonable measures are taken to ensure that the use of tobacco, tobacco products, alternative nicotine products, vapor products, or cigarettes by those under eighteen does not result from participating in the compliance effort. 453A.2(8).

## **FAQ'S**

1. Why are cigarette permit cases prosecuted in front of local licensing bodies?

In Iowa, cigarette permits are issued locally. Cities issue permits to retailers within their corporate limits. Counties issue permits to retailers in unincorporated areas of their counties. 453A.13. The only State issued retail permit is the one held by Amtrak for its club car that travels across several Iowa counties. 453A.23.

2. Within what time frame does a City or County have to begin prosecution?

A City or County has 60 days from the date of adjudication of the criminal violation to assess a penalty. Prosecution must therefore begin in a timely manner to meet that deadline. If the City/County fails to assess a penalty within this time period, the jurisdiction transfers to the State of Iowa. 453A.2(6).

3. If a violation of 453A.2(1) is found, is the City/County required to impose a sanction?

Yes. Iowa Code section 453A.22(2), requires the City/County assess a penalty dependent on whether it is a first, second, third, fourth or fifth violation.

4. Can the City/County suspend the sanction/fine?

No. The penalties are mandatory and there is no authority to suspend or modify the fines or suspensions specifically outlined in the Iowa Code.

5. Will the State prosecute the permit holder if the local licensing authority declines to do so?

Yes. If the City/County Attorney can not or will not prosecute, the Iowa Attorney General's Office will pursue the retail sanctions in front of an Administrative Law Judge. The Attorney General's Office will act on behalf of the ABD. 453A.2 as amended by 2011 Iowa Acts, H.F. 467 section 13 (effective date July 1 2011).

6. What is done with the fine money collected?

If the City/County prosecutes the case, the civil penalties are paid to and retained by the

City/County. If the Attorney General's Office prosecutes the case, the penalty is paid to the Treasurer, State of Iowa and deposited in the tobacco training and compliance fund. 453A.2(5).

7. How do I find out if there have been violations in my jurisdiction that I need to pursue?

Contact your local law enforcement or City Clerk/County Auditor. Or you may contact Steve Brown at ABD 515 -314-3655 or Connie Larson at the Attorney General's Office 515-281-5846.

8. Where can I find sample forms?

Sample forms are attached.

You may also go to [www.iowaattorneygeneral.gov](http://www.iowaattorneygeneral.gov), click on the bars to the left, click on "I would like to", click on "view the office divisions", click on Revenue and Tobacco Enforcement Division and scroll to the bottom of the page and click on Tobacco Enforcement Index. If you prefer a hard copy of the prosecution manual, please call Connie Larson at 515-281-5846 or email her at [Connie.Larson@iowa.gov](mailto:Connie.Larson@iowa.gov).

9. If the permit holder fails to pay the assessed penalty, how do I collect?

You may pursue this to judgment in small claims court.

10. For a first violation, is the \$300.00 fine applicable even if the retailer serves the 14 day suspension for not paying within thirty days after imposition of the sanction?

Yes. Even if the permit holder serves the 14 day suspension, the permit holder is still obligated to pay the \$300.00 fine. The 14 day suspension is an additional penalty for not paying the fine in a timely manner.

11. What happens if the permit holder forfeited its permit or went out of business?

You may defer pursuing the violation, but if the same person applies for a new permit within one year, the previous violation may be considered in determining whether to grant the new permit.

12. What if the retailer has changed ownership since the citation was issued?

The new owners cannot be held liable for a violation that occurred before they were the owners of the business. It may be impossible to pursue sanctions against the former owners if they no longer hold a permit. Timely prosecution of these matters is crucial.

However, sham transfers to evade liability, for example from husband to wife, should not preclude you from pursuing prosecution.

13. What rules apply at the hearing.

Permit holders are entitled to ten days notice and an opportunity to be heard. Iowa Code section 453A.22(1). They may be represented by legal counsel at their expense. Hearsay rules do not apply to the hearing because the penalties are administrative not criminal.

14. What are some common defenses and rebuttal thereto?

- a. Honest mistake - permit holder claims to have made one honest mistake with no intention to sell to a minor. An intent to sell to a minor is not an element of this offense. There is no exception to the penalty. Once you prove that a minor was given or sold cigarettes or tobacco products by the permit holder or an employee thereof, the case is complete.
- b. Vicarious liability - permit holder claims it is wrong to be held liable for a clerk's mistake. This defense is often combined with evidence that the retailer trained and instructed the employee to check identification before selling cigarettes and tobacco products.
- c. Non-profit organization - permit holder claims it is a nonprofit business that does good work for the community. The Iowa Code does not exempt these organizations.
- d. Good corporate citizen - permit holder claims it employs a lot of people, pays a lot of taxes and supports various community projects. The Iowa Code does not allow an exemption for this situation.
- e. Entrapment - permit holder claims it was entrapped. The Iowa Supreme Court has ruled that the use of undercover youth in alcohol stings is not entrapment. *Jim O. Inc. v. City of Cedar Rapids*, 587 N.W.2d 476 (Iowa 1998).
- f. Fake ID - permit holder claims a fake id was shown to the clerk. All undercover youth use their real identification. Prior to entering and after exiting the business, law enforcement examine the identification of all undercover youth.

**Affirmative Defense** - Permit holder may assert an affirmative defense of training if the employee who sold the tobacco, tobacco products, alternative nicotine products, vapor products, or cigarettes has a valid certificate of completion of the tobacco compliance employee training program. 453A.5. Only completion of the ABD sanctioned program may be used in asserting this defense. The permit holder may assert this defense only:

once in four years for a violation of 453A.2 and for a violation which takes place at the same place of business location. (453A.22(3)).

15. When does the four year period begin?

Time begins to run from the date the permit holder asserts the affirmative defense.

16. Does the permit holder have a right of appeal from a City/Council decision?

Yes. The permit holder may file a Writ of Certiorari with the district court arguing the City/County order was illegal. I.R.Civ. P. 1.1401 et seq. *Meyer v. Jones II*, 696 N.W.2d 611 (Iowa 2005).

17. If the criminal citation is dismissed, deferred or the defendant is found not guilty, can the action proceed against the permit holder?

Yes. Civil sanctions can be pursued independently of what happens with the criminal prosecution of the clerk.

18. Is the permit holder required to remove tobacco, tobacco products, alternative nicotine products, vapor products, or cigarettes from its shelves while serving a license suspension?

No. However, the permit holder may want to remove the product for its own protection. If a sale is made (even to an adult) while a business is under suspension, the retailer faces more penalties.

## **TOBACCO CASE LAW**

*Randall's International Inc. v. Iowa Beer & Liquor Control Dept.*, 429 N.W.2d 163 (Iowa 1988) (ABD) There is no due process violation when a retailer's beer permit is suspended as a result of an employee's criminal conviction for selling beer to a minor.

*Jim O. Inc. v. City of Cedar Rapids*, 587 N.W.2d 476 (Iowa 1998) (ABD) using minor for undercover sting not entrapment because it doesn't exceed the bounds of lawful police conduct and there is no proof that law enforcement tempted, induce or persuaded the bartender to break the law.

*State v. Casey's General Stores, Inc.*, 587 N.W.2d 599 (Iowa 1998) (criminal) corporations convicted of simple misdemeanors based on employee selling alcohol to minors; relevant criminal statutes impose obligation on the corporation not prohibiting certain conduct, no vicarious liability on licensee for employee sale to minor, vicarious liability of a corporation not

satisfied in this case; reversed, dismiss charges. (NOTE: Casey's involved a criminal action. The contested cases arising out of Iowa Code 453A.2 against the location are administrative, therefore there is no constitutional violation based on vicarious liability)

*Nash Finch Company v. City Council of the City of Cedar Rapids*, 672 N.W.2d 822 (Iowa 2003) (city council) (writ of certiorari to district court-show inferior board or officer exercising judicial functions, exceeded jurisdiction or acted illegally), supreme court review of district court ruling is at law-illegality established if the board did not act in accordance with a statute, if decision not supported by substantial evidence or if the actions were unreasonable, arbitrary, or capricious, bound by trial court findings if supported by substantial evidence, "evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion."; substantial evidence supports council decision; #475 store was continuation of #465 such that aggregation of violations was appropriate.

*State v. Lasley*, 705 N.W.2d 481 (Iowa 2005) (criminal) sale of cigarettes to minor on Indian reservation; court has subject matter jurisdiction.